UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/606
30 June 1993

ENGLISH
ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 606

Case No. 646: PARAISO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Hubert Thierry;

Whereas, on 27 December 1991, Alide H. Paraiso, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 27 January 1992, the Applicant, after making the necessary corrections, again filed an application containing pleas which read, in part, as follows:

"...

(d) The Applicant requests the Tribunal to award damages for the loss sustained [because of the storage by the Administration of his personal effects and furniture for 11 years] namely:

(i) Loss resulting from prolonged storage: US$

- Replacement value	38 223
- Delay ($1,000 per year)	16 000
- Maritime transport of furniture Geneva/Cotonou	5 777
- Moral damage	5 000
Total (i)	65 000

(ii) Loss of career development

- Including smaller contributions to the Pension Fund/ adjusted amount	110 000
- Moral damage	20 000
Total (ii)	130 000

..."

Whereas the Respondent filed his answer on 12 February 1993;

Whereas the Applicant filed written observations on 10 March 1993;

Whereas the Applicant filed an additional document on 7 June 1993;

Whereas the facts in the case are as follows:

The Applicant, a Beninese national, entered the service of the United Nations Office at Geneva on 9 July 1961, as a Professional Trainee at the P-2 level in the Finance Division. From 1961 to 1975, he was assigned to six different duty stations, the last being Dakar. In September 1975, he was reassigned "temporarily" to Geneva as a Finance Officer. The Personnel Action Form implementing the assignment states: "Expected duration of assignment in Geneva: six months". However, the assignment was continuously extended until the Applicant's retirement on 31 May 1985. Throughout his service with the United Nations, the Applicant received successive promotions to the P-3 level, with effect from 1 July 1970, and the P-4 level, with effect from 1 April 1984.

When the Applicant was reassigned from Dakar to Geneva, he was not entitled to payment of the costs of removal of his personal effects and household goods, in accordance with staff rule 107.27(a) (i), (ii) and (iii) in force at the time, because the assignment was

temporary. According to the record, before the Applicant's departure from Dakar, the Administration arranged for packing and storage of the Applicant's personal effects in Dakar at the Organization's expense. The packing company, SIMAF, and the Applicant jointly prepared a list, dated 31 August 1975, of the items to be stored. This inventory list was handed over to the Administration of the United Nations/African Institute for Economic Development and Planning Office at Dakar.

As the Applicant's assignment to Geneva continued to be on a temporary basis, the Administration did not authorize the removal to Geneva of his personal effects and household goods stored in Dakar.

In a letter dated 20 May 1979, the Applicant requested the Secretary-General to review his administrative situation, namely, his non-assignment to a permanent post and his non-promotion to the P-4 level. Having received no reply, on 21 June 1981, he lodged an appeal with the Geneva Joint Appeals Board. In its report dated 10 August 1983, the Board recommended, inter alia, "that a review of the work situation of the Appellant should be undertaken with a view to making the best possible use of his experience acquired in twenty-two years of serving the United Nations as a Finance Officer".

On 28 November 1983, the Assistant Secretary-General for Personnel Services transmitted to the Applicant a copy of the report dated 10 August 1983, and informed him that:

> "(a) [The Secretary-General has decided] to take note of the report of the Geneva Joint Appeals Board which should be communicated to the Director, Division of Administration, UNOG [United Nations Office at Geneva], with a view to pursuing the Board's recommendation concerning your career development, and
>
> (b) to take no further action in your case."

During his assignment in Geneva, the Applicant resided at Ferney-Voltaire, France. The five-year period during which the

Applicant was entitled not to pay customs charges for importing his personal effects and household goods into France had expired in September 1980. Accordingly, the Administration decided to issue a travel authorization in Geneva, dated 14 September 1981, authorizing the removal of the Applicant's household goods from Dakar to Benin. However, the Administration of the United Nations Office at Geneva did not forward to Dakar a copy of the travel authorization and the Applicant's personal effects were mistakenly shipped to Geneva. When the Applicant was informed that his household effects had arrived in Geneva in December 1981, he immediately requested, on 5 January 1982, that they be shipped back to Cotonou, Benin, in conformity with the travel authorization that had been issued by the United Nations Office at Geneva.

From December 1981 to August 1986, the Applicant's household goods remained in storage in Geneva. The storage company Inter-Transports SA Genève, where they were stored, threatened to auction the shipment because no order had been received from the United Nations Administration to ship them back to Benin.

On 11 June 1981, the Applicant had requested the Secretary-General to review the administrative decision to recover from his salary any charges for storage of his household effects in Dakar. On 12 July 1981, the Applicant lodged a second appeal with the Joint Appeals Board, concerning payment of these storage charges. In a second report dated 10 August 1983, the Joint Appeals Board had concluded, inter alia, that "(iii) ... Financial losses suffered by the Appellant as a result of an administrative mistake [to extend his assignment allowance] should be borne by the United Nations and not by the Appellant, who ... acted with due diligence, as evidenced by the fact that he requested removal of his personal effects from Dakar to Geneva on 3 February 1981 ..." The Board recommended that the Applicant be reimbursed "any storage charges recovered from him for the period 1 September 1980-15 March 1981".

In February 1985, the question concerning the forwarding of the Applicant's personal effects and household goods was again raised by the Applicant who, on 1 March 1986, wrote to the Administration. Having received no reply, he wrote again on 5 May 1986 to the Secretary-General, requesting his intervention, and received from Headquarters a reply dated 15 May 1986, promising to examine his case.

In a memorandum dated 13 June 1986, the Purchase, Transportation and Internal Services Section recommended to the Administration of the United Nations Office at Geneva payment of the storage costs in Geneva of the Applicant's household goods and personal effects, and their transportation to his country of origin.

Eventually, the Administration shipped the goods to Cotonou, Benin, on the basis of an "Ordre de Transport" issued on 4 August 1986, and assumed payment of the storage costs in Geneva. The goods arrived in a damaged condition on 16 September 1986.

On 7 February 1987, the Applicant filed a compensation claim pursuant to administrative instruction ST/AI/149/Rev.2 of 17 February 1984 relating to compensation for loss of or damage to personal effects with the Geneva Claims Board, which decided to refer the matter to the Claims Board at Headquarters.

On 23 June 1988, the Director, Division of Administration, United Nations Office at Geneva, informed the Applicant that the Controller had approved the recommendation of the Headquarters Claims Board to pay an amount of US$ 5,303.80 as compensation for damage to the goods.

On 12 September 1988, the Applicant requested the Secretary-General to review this administrative decision. Not having received a substantive reply, on 11 November 1988, the Applicant lodged an appeal with the Geneva Joint Appeals Board claiming compensation of US$ 38,223. The Board adopted its report on 4 October 1991. Its conclusions and recommendations read, in part, as follows:

"Conclusions and recommendations

44. In view of the foregoing, the Panel unanimously:

(b) Concludes that the New York Claims Board's recommendation (...) should be reaffirmed ...;

(c) Then concludes that the Administration, as a consequence of its inadequate and improper handling of the Appellant's transfer in 1975, the storage, shipment and reshipment of his household goods between 1975 and 1986, as well as his employment situation between 1975 and 1981, had created years of uncertainty and mental anguish for the Appellant;

(d) Further concludes that the Appellant, albeit having at times not acted with diligence, cannot be held responsible for the Administration's actions mentioned above.

45. The Panel therefore respectfully recommends to the Secretary-General that:

(a) The Appellant be awarded an ex gratia payment of US$ 10,000 in accordance with financial rule 110.13. This amount takes into account the extended number of years involved and the total circumstances surrounding this case."

On 25 October 1991, the Director, Office of the Under-Secretary-General for Administration and Management, transmitted to the Applicant a copy of the Joint Appeals Board report and informed him, in part, that:

"The Secretary-General has re-examined your case in the light of the Board's report. He fully shares the Board's conclusion that the contested decision, taken on the recommendation of the Claims Board, should be reaffirmed ...

The Secretary-General has decided ... to maintain the contested decision. At the same time, in view, in particular, of the delay in rectifying the administrative error of the shipment of your effects to Geneva, he has decided to grant you compensation in an amount equivalent to one month of your net base salary at the time of your separation from service."

On 27 January 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's career development was prejudiced by temporary assignments between 1 September 1975 and 31 May 1985, resulting in the failure to be promoted to the P-5 level.

2. The damage caused to the Applicant's personal effects and household goods due to prolonged and wrongful storage requires compensation adequate to replace them.

Whereas the Respondent's principal contentions are:

1. The Applicant's claims for compensation for assignment to temporary posts between 1975 and 1985 are both res judicata and not properly before the Tribunal.

2. The Applicant has already been adequately compensated for the loss and damage to his personal effects and household goods.

The Tribunal, having deliberated from 11 to 30 June 1993, now pronounces the following judgement:

I. The Applicant, a national of the Republic of Benin, now a retired staff member, entered the service of the United Nations in 1961 and, after several transfers, was assigned to Geneva from Dakar, Senegal, in 1975. From that date until his retirement in 1985, he filled temporary posts although he had acquired the status of a permanent staff member at the P-4 level.

At the time of his departure for Geneva, since staff members occupying a post for a period of six months or less were not entitled, under the Financial Regulations in force in 1975, to the removal of their baggage, personal effects and furniture, those belonging to the Applicant were stored at Dakar by the Administration. Through an error on the Administration's part, they were sent to Geneva, and then forwarded to Cotonou, Benin, in 1986.

Because of their prolonged storage for 11 years and other circumstances, these goods arrived at their destination in a damaged condition.

The Applicant, having refused the Administration's offer of a lump-sum compensation, which he deemed insufficient and wanted to have increased, has submitted his case to the Tribunal.

II. In support of his pleas, the Applicant makes two major substantive arguments:

First, that the temporary assignments which he has had for 10 years, from 1 September 1975 to 31 May 1985, have prevented him from reaching the P-5 level, and that his career has suffered as a result. The Applicant further maintains that he should be compensated for the moral damage which he has suffered.

Secondly, that the damage caused to his personal effects and furniture by their prolonged storage and improper handling requires adequate compensation so as to enable him to replace them.

III. The Respondent requests the Tribunal to reject the Applicant's claims, maintaining, first, that his requests for compensation for the loss of his career development as a result of assignments to temporary posts from 1975 to 1985 are both res judicata and not properly before the Tribunal.

The Respondent further asserts that the Applicant has already obtained adequate compensation for the losses resulting from the damage caused to his personal effects and furniture.

IV. With regard to the Applicant's complaints relating to his career, the Tribunal notes that he instituted a proceeding before the Joint Appeals Board (JAB) in 1981. The JAB made a recommendation in its report of 10 August 1983, and the Secretary-General took a decision thereon. The Applicant did not submit his case to the Tribunal at that time. Consequently, any new claim relating to the Applicant's career is now time-barred, in accordance with the provisions of article 7, paragraph 2, of the Statute of the Tribunal.

V. With regard to the Applicant's request for compensation for the losses resulting from the damage caused to his baggage and furniture, the Tribunal notes that such damage is attributable to the bureaucratic delays which led to the prolonged storage. Moreover, through an error on the Administration's part, these effects were shipped to Geneva. Accordingly, the Respondent should be held responsible.

VI. The Tribunal notes, however, that the Applicant himself bears a share of responsibility for the unduly prolonged storage of his baggage, personal effects and furniture, which was partly caused by his refusal to take delivery of these goods in Geneva so as to avoid paying customs duties.

VII. In view of the special circumstances of the case submitted for review, the Tribunal considers that it is fair to compensate the Applicant for the losses suffered.

VIII. For the foregoing reasons, the Tribunal:

1. Declares that the Applicant's request for compensation for the loss which he claims to have suffered as a result of assignments to temporary posts from 1975 to 1985 is not receivable.

2. Orders the Respondent to pay to the Applicant a sum of US$25,000 as compensation for the damage caused to his personal effects and furniture, less any other amounts already collected on that account.

3. Decides to award the Applicant, for the moral damage resulting from the Administration's negligence with regard to his baggage and personal effects, a sum equivalent to one month's net salary, as of the date of his separation from service.

4. All other claims are rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Hubert THIERRY
Member

Geneva, 30 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/607
30 June 1993

ENGLISH
ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 607

Case No. 656: THOLLON

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Hubert Thierry;

Whereas at the request of Jean Thollon, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 December 1991 and 28 February 1992 the time-limit for the filing of an application to the Tribunal;

Whereas, on 28 February 1992, the Applicant filed an application containing the following principal pleas:

> "5. [To] rescind the decision of the Secretary-General to reject the unanimous recommendation of the Joint Appeals Board contained in its report No. 839 of 2 July 1991, paragraph 17, ...
>
> 6. [To] order the implementation of the Joint Appeals Board's unanimous recommendation contained in paragraph 17 of its report and consequently, the transfer of Applicant to the first available P-4 post in Geneva, ...
>
> 7. [To] order the Respondent to pay the Applicant the sum equivalent to two years base salary as compensation for the Secretary-General's decision not to implement the report of the Panel on Discrimination [dated] 12 May 1983 ...
>
> 8. Alternatively, in lieu of specific performance regarding his transfer to Geneva, [to] order the Secretary-General to pay instead the Applicant, as compensation, the sum equivalent to three years net base salary."

Whereas the Respondent filed his answer on 29 April 1992;

Whereas the Applicant filed written observations on 11 August 1992;

Whereas, on 20 May 1993, the Applicant submitted additional documents, to which the Respondent filed comments on 2 June 1993;

Whereas the Applicant filed an additional document on 11 June 1992;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 16 October 1974, as an Associate Public Administration Officer in the Department of Economic and Social Affairs. He was initially offered a two-year fixed-term appointment at the P-2, step VIII level that was successively extended for further fixed-term periods, to 15 October 1976, 15 October 1978 and, finally, to 15 October 1981. On 1 October 1981, his appointment became probationary, and on 1 July 1982, permanent. On 1 April 1977, the Applicant was promoted to the P-3 level as a Public Administration Officer, and on 1 April 1983, to the P-4 level.

During 1983, the Applicant, on account of difficulties with his supervisor, the Chief of the Fiscal and Financial Branch, filed a complaint with the Panel on Discrimination and Other Grievances (the Panel on Discrimination). In a letter dated 12 May 1983 from the Coordinator of the Panel on Discrimination to the then Under-Secretary-General, Department of International Economic and Social Affairs, the Coordinator expressed satisfaction at the fact that the Under-Secretary-General had met with a member of the Panel and had agreed that he would be taking steps to provide [the Applicant] with a suitable transfer within [his] office". The Applicant, however, was not transferred from his post. In March 1985, the Assistant Secretary-General for Development Research and Policy Analysis, Department of International Economic and Social Affairs, assigned the Applicant to work in his office, an arrangement which lasted

until December 1987, when the Chief of the Fiscal and Financial Branch retired. The Applicant then resumed his former functions.

In May 1987 the Applicant's father died. On 7 October 1987, the Applicant wrote to the Assistant Secretary-General, Office of Human Resources Management, expressing the wish, as an only child, to be transferred to Geneva in order to be closer to his mother, who lived in Grenoble and was almost blind. The Applicant was then advised, on 9 October 1987, to apply "for appropriate positions under the Vacancy Management and Staff Redeployment Programme". The Applicant applied for several posts in Geneva, but was not selected.

On 28 February 1990, the Applicant requested the Secretary-General to review the decision not to transfer him, in particular, to Geneva, despite his having applied for about one dozen posts (some located in Geneva), and despite the 1983 recommendation of the Panel on Discrimination, apparently accepted by the former head of his department, that he should be transferred to another post within that department.

On 3 April 1990, the Chief of the Administrative Review Unit sent a communication to the Applicant, which read, in part, as follows:

> "While I sympathize with your wish to find a position that would enable you to be closer to your mother, who is aged and infirm, I regret that your request does not appear to comply with the provisions of staff rule 111.2(a). The Grievance Panel recommendation was nearly seven years ago, and there is no indication of deliberate non-compliance on the part of DIESA [Department of International Economic and Social Affairs]. To be placed on a short list for a post is not included in your terms of appointment. Under the Vacancy Management system, it is your responsibility to apply for any suitable vacant post, and I would urge you to do so, and to seek the assistance of the Recruitment and Placement Division in finding a suitable vacancy."

On 17 May 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 2 July 1991. Its conclusions and recommendations read as follows:

"Conclusions and Recommendations

15. Although the Panel has only been seized with the present appeal, it felt it would be irresponsible if it did not bring to the attention of the Administration the fact that, not only Appellant, but the Fiscal and Financial Branch as a whole has suffered from administrative neglect.

16. The Panel, having taken into consideration the admitted quality of Appellant's work, the fact that - while still in the Fiscal and Financial Branch - he was not assigned work in his area of expertise, and his seniority in grade, concludes that Appellant has not received fair and just treatment and that his career has suffered as a consequence.

17. The Panel recommends that, in view of Appellant's family circumstances and consistent with the authority of the Secretary-General under staff regulation 1.2, Appellant be transferred at the earliest possible moment to a suitable post in Geneva, one in which he will have reasonable career development opportunities. Should such a post in Geneva not become available within ninety days, Appellant should be offered a post at Headquarters with adequate career development opportunities, as the Panel is convinced that Appellant should in any event be transferred without further delay.

18. The Panel makes no further recommendation with respect to this appeal."

On 22 July 1991, the Officer-in-Charge of the Department of Administration and Management wrote to the Applicant, advising him as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has serious reservations with regard to the Board's conclusions concerning the receivability of the appeal and, bearing in mind the following considerations:

(a) that a staff member has no right to any particular assignment or function;

(b) that movement of staff to posts at the same or a higher level is subject to established procedures and, while staff members have a right to be considered under such procedures for posts for which they are qualified, they have no right to reassignment to another post; and

(c) that a staff member has a right to be assigned tasks commensurate with his/her level and qualifications;

the Secretary-General has decided that, in lieu of the actions recommended by the Board:

(a) your department review your assignments/functions and take the necessary measures to ensure, that either in your present post or in another post in the department, you are given, on a full-time basis, assignments/functions which are commensurate with your grade level and qualifications, and,

(b) at the same time, special efforts be made to ensure that you are given full and fair consideration for posts outside your department for which you are qualified and for which you apply."

On 28 February 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The rejection by the Secretary-General of the unanimous report of the JAB violates his commitment to implement unanimous recommendations of the Board.

2. The recommendation contained in paragraph 17 of the unanimous JAB report does not constitute a violation of any major question of law or principle and should have been implemented.

3. The Administration violated the Applicant's rights by ignoring the report of the Panel on Discrimination on his case.

Whereas the Respondent's principal contentions are:

1. Assignment of staff is at the discretion of the Secretary-General. The Applicant has not discharged the burden of proof to establish that his non-selection for posts for which he had applied was improperly motivated.

2. The Secretary-General is not bound to accept unanimous recommendations of the JAB.

The Tribunal, having deliberated from 11 to 30 June 1993, now pronounces the following judgement:

I. The Applicant, a French national, entered the service of the United Nations in October 1974; he performed various functions, and was promoted to the P-4 level in April 1983.

The Applicant requested, unsuccessfully, to be transferred to Geneva, in order to be as near as possible to his aged and infirm mother, who lived in Grenoble. Because of the Administration's inaction, he lodged an appeal with the Joint Appeals Board (JAB), whose recommendations were endorsed by the Administration. The JAB had recommended that the Applicant be transferred "at the earliest possible moment to a suitable post in Geneva, one in which he will have reasonable career development opportunities" or, alternatively, that he be offered an equivalent post at United Nations Headquarters.

II. As this recommendation was not implemented, despite having been accepted by the Secretary-General, the Applicant, believing that he had been a victim of discrimination, filed an appeal with the Tribunal. The Applicant requests the Tribunal to order the implementation of the JAB's recommendation. Alternatively, the Applicant requests, as compensation, a sum equivalent to three years' net base salary.

III. The Respondent asks the Tribunal to reject the application, arguing that the Administration has exercised its discretionary powers, and that the Applicant has not discharged the burden of proving that the failure to select him for the various posts for which he has applied was motivated by extraneous factors. Lastly, the Respondent maintains that the Administration is not bound to accept unanimous recommendations of the JAB.

IV. The Tribunal, in accordance with its jurisprudence, reaffirms that the Secretary-General has discretionary powers to appoint

officials to certain posts or to reject such appointments, so long as his decision is not tainted by improper motives and he has acted in the interests of the service (cf. Judgements No. 573, Bhatia (1992), para. VII, and No. 574, Megzari (1992)). The Tribunal further notes that a staff member has no right to any particular post within the Administration, and that the selection of candidates depends on both their personal merits and their qualifications. (Cf. Judgement No. 574, Megzari, para. III.) On the other hand, the Tribunal notes that all staff members have a right to be employed in a manner commensurate with their qualifications and skills. (Cf. Judgement No. 544, Lukas (1991)).

V. The Tribunal further notes, in accordance with its jurisprudence, that while a unanimous recommendation of the JAB carries special weight because of such unanimity, it constitutes no more than advice, and does not create an obligation which the Respondent must comply (cf. Judgements No. 377, Jabri (1986), para. XI, and No. 562, Al-Jaff (1992)).

VI. In the case under review, the Tribunal notes that, as the JAB and the Administration have acknowledged, the Applicant has never been properly employed. Furthermore, the Tribunal considers that the authorities responsible for carrying out the Secretary-General's instructions have not made the requisite efforts to transfer the Applicant to a post commensurate with his abilities. The Tribunal concludes that the Applicant has thus suffered an injury which must be compensated. The Tribunal further notes that, from 1982 to 1987, the Applicant's performance has not been evaluated in accordance with the provisions of staff rule 112.6. The Tribunal considers that the failure to evaluate the Applicant's performance may have influenced the fact that he remained at the same level for so long. Accordingly, the Tribunal holds that compensation is also called for on this account.

VII. For the foregoing reasons, the Tribunal:

1. Decides that the Applicant shall be awarded a lump sum of US$5,000 for the various injuries suffered.

2. Decides that, in the interests of the service, the Respondent shall, on compassionate grounds, make every effort to transfer the Applicant to a post commensurate with his qualifications, preferably in Geneva.

3. Rejects all other pleas.

(Signatures)

Samar SEN
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Hubert THIERRY
Member

Geneva, 30 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/608
1 July 1993

ENGLISH
ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 608

Case No. 654: PENNACCHI Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Hubert Thierry; Mr. Mikuin Leliel Balanda;

Whereas at the request of Luisa Pennacchi, a former staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, the President of the Tribunal, with the agreement of the Respondent, extended to 21 February 1992 the time-limit for the filing of an application to the Tribunal;

Whereas, on 17 February 1992, the Applicant filed an application containing the following principal pleas:

"May it please the Administrative Tribunal of the United Nations

...

- To declare null and void the decision of 30 November 1988 to terminate the Applicant's permanent appointment, as confirmed by the decision of 13 April 1989;

Having done that

- To order UNICEF to reinstate the Applicant in her post with tasks corresponding to her professional qualifications;

- To order UNICEF to pay to the Applicant, as costs, fair compensation.

(c) In addition,

- To order UNICEF to pay to the Applicant the sum of 1,306,289.45 Swiss francs as compensation for the material and moral injuries which she has suffered."

Whereas the Respondent filed his answer on 18 June 1992;

Whereas the Applicant filed written observations on 5 August 1992;

Whereas, on 11 June 1993, the Tribunal put questions to the Respondent, to which he replied on 15 June 1993;

Whereas the Tribunal decided, on 23 June 1993, that there would be no oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF as a "Mimeographer" and served on a number of short-term contracts from 5 December 1972 to January 1975. On 2 June 1975, she was recruited on a fixed-term appointment at the G-2, step I level, as a Mimeographer/Messenger in the Administrative Division. She served on a succession of fixed-term appointments until 2 September 1976, when she received a probationary appointment. Her functional title had, with effect from 1 September 1975, been changed to Junior Administrative Services Clerk. On 1 September 1977, the Applicant's appointment became permanent and, on 1 October 1985, she was promoted to the G-3, step VIII level with the functional title of Administrative Services Clerk.

In a Note for the record dated 10 March 1988, the Deputy Director of the UNICEF office in Geneva attested that on 7 March 1988, a meeting was held in the presence of the Director of the office, his deputy, a representative of the UNICEF Geneva Staff Committee and a representative of the Personnel Department. The

Applicant was informed that she was among the staff whose posts were affected by the intended reorganization of the Geneva office and that the following options were open to her: "(a) She may apply for any newly created posts. (b) She may apply for other vacant posts which may arise within the office. (c) She may apply for a field posting. (d) She may apply for a vacant post which may arise within the United Nations system in Geneva ... [and] should this be the case, Management will give full support to her application. (e) She may [receive] an agreed termination."

On 10 March 1988, the Applicant wrcte to the Deputy Executive Director, asking to be assigned to a post in the Greeting Cards Operation, since her family situation did not permit her to remain without work. In a reply dated 24 March 1988, the Deputy Executive Director informed the Applicant that the question of the restructuring of the Geneva office was "ongoing" and that he was not in a position to know, at the time, what the Executive Board's decision would be. However, if the Executive Board should decide to abolish the Applicant's post, her request would be taken into consideration.

On 26 April 1988, an incident took place between the Applicant and another staff member, involving alleged physical violence by the Applicant. As a result of this incident, on 27 April 1988, the Applicant was suspended from service with full pay, pending investigation under staff rule 110.4. The Applicant's case was referred to the Geneva Joint Disciplinary Committee for advice.

A Note for the record, dated 9 May 1988, reports on a meeting held on 6 May 1988 between the Deputy Director, the Applicant, a representative of the UNICEF Geneva Staff Committee and a representative of the Administration, to discuss the decision to suspend the Applicant from service. The Applicant had requested, in a letter dated 2 May 1988, that the "possibility of reaching an amicable agreement" should be envisaged.

The Geneva Joint Disciplinary Committee adopted its report on the incident on 12 September 1988 and recommended to the Secretary-General that the Applicant be given a written censure. On 26 October 1988, the Under-Secretary-General for Administration and Management wrote to the Applicant, conveying the decision of the Secretary-General to suspend her from service without pay for one month, as a disciplinary measure under staff rule 110.3(b). Accordingly, the Applicant was suspended from 1 November until 30 November 1988. She appealed against this decision, which the Secretary-General maintained after having re-examined her case in the light of the Geneva Joint Appeals Board report. The Administrative Tribunal upheld the Secretary-General's decision in its Judgement No. 542.

In a letter dated 30 November 1988, the Deputy Director of the Geneva office, referring to the meeting held on 7 March 1988, informed the Applicant that, upon the recommendation of the Budget and Planning Review Committee which had completed its review of the budgetary estimates concerning the restructuring of the Geneva office, the Executive Director had decided to abolish her post, as well as a number of other posts, as from 1 January 1989. In accordance with paragraph 6 of UNICEF administrative instruction CF/AI/1986-10, dated 26 November 1986, on the subject of personnel policies and procedures applicable to incumbents of posts which are to be abolished, the Applicant would continue to be a UNICEF staff member until 31 May 1989 (representing a period of notice of six months for staff members on permanent appointments). The Deputy Director further informed the Applicant that if, during the six-month period, she could not find another post corresponding to her qualifications within UNICEF or within the United Nations common system, her appointment with UNICEF would be terminated.

On 26 January 1989, the Applicant requested the Secretary-General to review the decision to abolish her post. In this

communication, the Applicant argued essentially that the decision to abolish her post did not appear to be "objectively justified by the necessities of the service but is rather an additional sanction and completely arbitrary, linked to the outcome of the incident of 26 April 1988". In a reply dated 13 April 1989, the Deputy Executive Director informed the Applicant that she saw "no reason to change the decision to abolish [the Applicant's] post as a part of the restructuring plan of the Office in Geneva which was duly approved by the Budget and Planning Review Committee and subsequently by the UNICEF Executive Director". On 17 May 1989, the Applicant lodged an appeal with the Geneva Joint Appeals Board.

On 29 May 1989, the Deputy Director of UNICEF Geneva wrote to the Applicant, confirming her separation from service as from 1 June 1989. The Applicant was paid a termination indemnity in accordance with annex III, paragraph (a), of the Staff Regulations.

The Joint Appeals Board adopted its report on 10 July 1991. Its conclusions and recommendation read as follows:

> "40. In view of the foregoing, the Panel concludes that the decision by UNICEF to abolish a number of posts (including that of the Appellant's) as of 1 January 1989, in view of the restructuring of the Geneva office, was a valid exercise of discretionary power within the meaning of staff regulation 9.1(a).
>
> 41. The Panel also concludes that the decision to terminate the Appellant's permanent appointment was a direct result of the abolition of her post and was not linked with the disciplinary proceedings instituted in her case for an incident which took place seven weeks after she was already apprised of the possible abolition of her post; and that the contested decision was not taken with improper motives or abuse of power.
>
> 42. The Panel finally concludes that the Administration had duly observed the conditions for terminating permanent appointments for abolition of post or reduction of staff, as laid down in staff rule 109.1(c) and in UNICEF administrative instruction CF/AI/1986-10.

43. Accordingly, the Panel makes no recommendation in support of the appeal."

On 15 August 1991, the Officer-in-Charge for Administration and Management transmitted to the Applicant a copy of the Joint Appeals Board report and informed her that the Secretary-General, having re-examined her case in the light of the Board's report, had decided to maintain the contested decision and to take no further action on the case.

On 17 February 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The necessities of the service did not require the abolition of her post.

2. The abolition of the aforesaid post constituted an abuse of power, as it was merely a pretext for getting rid of the Applicant.

3. The Administration has not really abolished the Applicant's post, since it has neither waived the performance of certain tasks, nor terminated the staff member who was to perform them, in order to assign them to one or more other staff members.

4. The Administration has not observed staff rule 109.1(c), which provides that the Administration must seek to reassign an official whose post has been abolished. This rule has not been observed.

Whereas the Respondent's principal contentions are:

1. The necessities of the service required the Administration to abolish the Applicant's post, among others.

2. The decision of the UNICEF Administration to abolish the Applicant's post in the context of the restructuring of its Geneva office was a valid exercise of its discretionary powers within the meaning of staff regulation 9.1(a).

3. The abolition of the post, leading to the Applicant's termination, was due to the restructuring of the UNICEF office in Geneva.

4. The provisions of administrative instruction CF/AI/1986-10 have been observed by the Administration.

The Tribunal, having deliberated from 9 June to 1 July 1993, now pronounces the following judgement:

I. The Applicant, a former staff member of the United Nations Children's Fund (UNICEF), separated from service on 31 May 1989, following the abolition of her post. She requests the Tribunal to revoke the decision of 13 April 1989, which confirmed that of 30 November 1988. Accordingly, on the one hand, she requests the Tribunal to order UNICEF to reinstate her in her post and to assign to her tasks corresponding to her qualifications. On the other hand, she requests that she be awarded a fair amount, as costs. Lastly, she requests that she be awarded a sum as compensation for the material and moral injuries which she has suffered.

II. The Respondent argues that it was the necessities of the service which required the UNICEF Administration to abolish a number of posts, including that of the Applicant. The Respondent argues further that the Administration's decision to abolish the Applicant's post in the context of the restructuring of its Geneva office constituted a valid exercise of its discretionary power within the meaning of staff regulation 9.1(a). Lastly, the Respondent maintains that the provisions of administrative instruction CF/AI/1986-10 concerning the modalities of application of the principles contained in staff rule 109.1(c) have been duly observed.

III. The Tribunal notes that on 7 March and 30 November 1988, the Director of UNICEF Geneva had informed the staff that posts would be

abolished as from 1 January 1989. The Tribunal finds that the decision not to maintain the Applicant's post was taken for administrative reasons and was free of any bias.

The Tribunal further notes that, on that occasion, the Applicant received prior notice, as provided for under staff rule 109.3.

IV. The Tribunal notes, moreover, that, having been notified of the abolition of her post, the Applicant applied, unsuccessfully, for several posts; her lack of success was due to the inadequacy of both her linguistic skills and her qualifications, as evidenced by the letter from the Deputy Director dated 17 March 1989.

V. The Tribunal finds that, as stated by the Respondent, it was indeed the necessities of the service that justified the termination of the Applicant's employment, rather than the incident which gave rise to a disciplinary proceeding; that incident, moreover, occurred well after the Applicant had been informed of the abolition of her post. Furthermore, as the Tribunal has frequently held, it will not substitute its judgement for that of the Administration in respect of the reorganization of service.

Thus, in the case under review, the provisions of staff regulation 9.1(a) and of the above-mentioned administrative instruction, which specify the modalities of application of staff rule 109.1(e), have been observed.

Furthermore, the Applicant has presented no evidence that the Administration's decision to abolish her post constituted an abuse of power, or that such a decision was taken for reasons other than the interests of the service.

VI. For the foregoing reasons, the Tribunal rejects the application.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Hubert THIERRY
Member

Geneva, 1 July 1993

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/609
1 July 1993

ENGLISH
ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 609

Case No. 634: ABBASSENE Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Hubert Thierry; Mr. Mikuin Leliel Balanda;

Whereas, at the request of Abdelkader Abbassene, a former staff member of the United Nations Development Programme, hereinafter referred to as UNDP, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 July and 30 November 1990 and 28 February 1991 the time-limit for the filing of an application to the Tribunal;

Whereas, on 12 January 1991, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, further extended to 31 March 1991 the time-limit for the filing of an application to the Tribunal;

Whereas, on 9 March 1991, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 29 March 1991, the Applicant, after making the necessary corrections, again filed an application containing pleas which read, in part, as follows:

> "(a) to rescind the Respondent's decision of 14 June 1988 to terminate his employment with UNDP and to direct the Respondent to reinstate him as staff member;
>
> (b) to order payment to the Appellant of salary lost during the period of employment between the termination of his contract and the reconstruction of his career."

Whereas the Respondent filed his answer on 25 August 1992;

Whereas the Applicant filed an additional document on 2 May 1993;

Whereas, on 4 June 1993, the Tribunal put questions to the Respondent, to which he replied on 15 and 22 June 1993;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP on 1 February 1971, as a Driver at level 2 of the local salary scale, in the UNDP Office in Algiers. He served on a succession of fixed-term appointments until 1 March 1980, when he was granted a probationary appointment and assigned to a post of Driver/Mechanic. On 1 May 1981, he was granted a permanent appointment. The Applicant was promoted to level 3 on 1 January 1981 and to level 4 on 1 January 1985.

In 1984 and 1985, the UNDP Governing Council asked host Governments to increase the level of their contributions towards the costs of operating local offices. The level of contributions towards the local office costs in Algeria was to increase from 50 per cent to 75 per cent, commencing in 1987.

In a letter dated 11 July 1987, the UNDP Resident Representative advised the Applicant that he had been very

disappointed at finding the Applicant and other drivers engaged in a domino game during working hours. This fact had confirmed to him that the functions of Driver/Mechanic did not sufficiently occupy the Applicant's time; accordingly, in addition to his duties as Driver/Mechanic, the Applicant would be assigned to building maintenance tasks which would be reflected in an amended job description.

On 1 August 1987, the UNDP Deputy Resident Representative in Algiers gave the Applicant his new job description. In addition to his duties as a Driver/Mechanic, the Applicant was to perform the duties of a maintenance clerk, which included the maintenance of the common areas of the United Nations building and the floors occupied by UNDP and other agencies, as well as repairs of those premises.

On 4 August 1987, the Applicant wrote to the Deputy Resident Representative, stating that the tasks described in his new job description could not be discharged by a single person. He asked that the decision to assign him additional duties be reconsidered.

In a reply dated 9 August 1987, the Deputy Resident Representative recalled that the Resident Representative had personally explained to the Applicant that all staff in the office were required to make a greater effort to discharge all duties for which they were responsible. In addition, it had been made clear to the Applicant that he must undertake maintenance duties, in addition to his duties of a Driver/Mechanic, as those duties did not occupy his time completely.

In a memorandum dated 5 January 1988, the Resident Representative proposed to the Deputy Director, Division of Personnel, certain reductions of core posts in the Algiers Office.

With regard to the Applicant's post he stated:

"(i) Post No. 103539 Driver/Mechanic [the Applicant's post]

I have already consulted my colleagues through the attached letter on the possibility of cost-sharing the extrabudgetary post that should be created to maintain basic mechanical repair facilities at least until such time as local commercial services meet required standards in terms of quality and cost.

...

I trust that the above proposals accurately reflect the consensus reached with DOP/RBASEP [Regional Bureau for Arab States and European Programmes] on 21 December and that they will meet with your approval."

On 14 April 1988, the Director, Division of Personnel, sought the Administrator's approval to terminate the permanent appointments of two local staff members in Algiers for abolition of post. The Applicant was one of them. The Director of Personnel explained that this decision had been taken due to financial constraints on the part of the Algerian Government, which contributed a substantial portion of local staff salaries, and that the Applicant and another staff member could not be placed in other posts. On 2 May 1988, the Administrator approved the request for termination of the Applicant's appointment for abolition of post.

In a memorandum dated 14 June 1988, the Deputy Assistant Administrator informed the Applicant that since the post which he encumbered had been abolished, the Administrator had decided to terminate his appointment under staff regulation 9.1 (a), effective 15 June 1988.

In a cable dated 15 June 1988, the Applicant requested a review of that decision. Not having received a substantive reply from the Administration, the Applicant lodged an undated appeal with the Joint Appeals Board, which was received by the Board on 29 November 1988. The Board adopted its report on 29 August 1989. The majority of the Panel that considered the case recommended as follows:

"34. ...

the decision of the Deputy Resident Representative to require the appellant to perform maintenance functions for an entire building, in addition to performing his regular duties as Driver/Mechanic, amounted to unfair treatment;

the decision to terminate the appellant's permanent contract for abolition of post under staff regulation 9.1 (a) appears to have been motivated by antagonism resulting from the appellant's objection to his new job description and was not due solely to 'reduced financial allocations available for the operations of the UNDP Office in Algeria';

the termination of the appellant's contract of employment was improper because efforts made by the Resident Representative, in this connection, were inadequate to satisfy the conditions for terminating permanent appointment for abolition of the post or reduction of the staff as set forth in staff rule 109.1 (c).

35. Accordingly, the majority of the Panel recommends that the Administration reinstate the appellant in the full enjoyment of his appointed status as a permanent contract holder.

36. It further recommends that the appellant be restored to all rights and benefits appertaining thereto, as fully and completely as though no termination of his appointment had been made."

In a dissenting opinion, the Chairman of the Panel stated:

2. ... The record shows that the abolition of the post held by the appellant was a managerial decision following the UNDP Governing Council resolutions concerning the level of government contribution to local cost. There is no evidence from the record that there was a motivation other than a managerial one connected with the abolition of the post. ...

3. Concerning the termination of the appellant, the record shows that this was due to the abolition of his post. ...

4. ... At about the time that the abolition of posts took effect, the Staff Management Co-ordinating Committee (SMCC) recommended to the Secretary-General criteria for the granting of termination benefits in different situations. Though this development may have occurred too late for the UNDP Administration to take into account in the case of the appellant, it nevertheless emphasizes that the termination benefit in his case could have justifiably included the

additional 50 per cent benefit. For the above reasons, I believe that the Administration could have been more generous and given an additional 50 per cent termination benefit.

Recommendation

4. In conclusion, I recommend that the appeal of the appellant to be reinstated be rejected. However, I also recommend that the appellant be granted an additional 50 per cent separation benefit."

On 12 January 1990, the Officer-in-Charge, Department of Administration and Management, informed the Applicant that the Secretary-General had re-examined his case in the light of the Board's report and had decided to maintain the contested decision of the UNDP Administrator to terminate his appointment for abolition of post under staff regulation 9.1 (a) and staff rule 109.1 (c). He added, in part:

"... It is the view of the Secretary-General that good faith efforts were made by UNDP to find an adequate post for you as shown on the official record. Furthermore, there is no concrete evidence of alleged improper motives on the part of the Administration.

The Secretary-General has therefore decided, taking into account the entire circumstances of your case, to grant you, on an exceptional basis, an additional 50 per cent termination indemnity under staff regulation 9.3 (b) in final settlement of your case."

On 29 March 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's appointment was not based on the requirements of the service but on antagonism towards him and thus constituted unfair treatment.

2. The Respondent did not follow the requirements of staff rule 109.1 (c) in cases of termination of appointment for abolition of post.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's appointment was caused by the abolition of the post he occupied because of the necessities of the service, as provided for in staff regulation 9.1 (a), which provision is part of the Applicant's terms of employment.

2. Staff rule 109.1 (c) contains procedural safeguards designed to protect staff faced with separation on account of abolition of post. These safeguards were applied.

The Tribunal, having deliberated from 2 June to 1 July 1993, now pronounces the following judgement:

I. The Tribunal, in reviewing the application which has been submitted to it, must take a decision on two separate questions. In the first place, it must determine the accuracy of the reason cited by the UNDP authorities for the decision whereby the Applicant, who had been employed since 1971 as a Driver/Mechanic in the UNDP Office in Algiers, was terminated, effective 15 June 1988. Secondly, the Tribunal must determine whether the safeguards of staff regulation 9.1, should be applicable to permanent staff members who are faced with separation on account of abolition of post, have been observed.

II. The Respondent maintains that the only reason for the measure taken in the Applicant's case was the abolition of his post owing to a staff reduction made necessary by the decrease in the Algerian Government's contribution to the salaries of locally recruited UNDP staff.

The Applicant contends that, on the contrary, his termination resulted from his refusal to accept the change in his original job description. The UNDP Deputy Resident Representative in Algiers, believing that the Applicant's dutioes as a Driver/Mechanic did not fully occupy his working hours had

ordered him to add to them the maintenance of the UNDP premises. This is the measure that the Applicant rejected, arguing that these additional tasks did not reflect his functions and abilities and made his workload too heavy.

Prior to this, an incident had occurred, an account of which can be found in a document which the Respondent has annexed to his answer: on the occasion of an unannounced visit to the garage where the Applicant performed his duties, the UNDP Resident Representative found him playing dominoes with two other drivers and two persons who were not members of the staff. The Applicant does not dispute the truthfulness of this account of the episode, which induced the Administration to assign him additional duties; however, he asserts that it constituted the real reason for his termination. If this were the case, the reason officially cited for the termination would be inaccurate.

III. The Tribunal believes that the only way of resolving this dispute would be to conduct a thorough investigation, which could hardly be carried out with any likelihood of success, in view of the time which has elapsed since the incident occurred. While considering that it is not improbable that the domino-playing incident had a negative impact on the Applicant's fate, the Tribunal finds that the burden of proving the inaccuracy of the reason cited by the Administration has not been discharged. The Tribunal considers that the documents which were transmitted to it by the Respondent show that the Algerian Government had indeed reduced its contributions.

IV. With regard to the measures that should be adopted for the purposes of implementing staff regulation 9.1 and, accordingly, the efforts that should be made to reassign the Applicant, if possible, to a post commensurate with his abilities, the Tribunal notes that the UNDP Resident Representative in Algiers planned to create, on a provisional basis, an extrabudgetary mechanic post which could have been suitable for the Applicant. This plan did not work out, but it

testifies to the Administration's good will, since the record shows that the UNDP authorities in Algiers were hardly in a position to offer the Applicant a replacement post.

V. The Tribunal finds, however, that the Applicant's termination was carried out in a remarkably hasty manner. Having worked for UNDP since 1971 - hence, for 17 years - he was informed on 14 June 1988 of his termination, effective the following day, 15 June 1988. This procedure did not give him any time to look fo another job in Algiers, where there was a severe and prolonged crisis in the labour market. Accordingly, the Applicant should be compensated.

The Tribunal believes that an indemnity of $1,000, over and above the statutory termination indemnity which he has already received, should be awarded to the Applicant as compensation for the injury caused to him by the manner in which his termination was carried out.

VI. For the foregoing reasons:

1. The Tribunal orders that the Applicant be awarded an indemnity of $1,000.

2. All other requests are rejected, including the request for the production of records.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Hubert THIERRY
Member

Mikuin Leliel BALANDA
Member

Geneva, 1 July 1993

R. Maria VICIEN-MILBURN
Executive Secretary